87-2086

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et al.,
Petitioners,

vs.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HERBERT F. KAISER*
The Alcoa Building, Suite 1600
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184
Attorney for Petitioners
David A. Boone, et al.

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

25 pp

QUESTIONS PRESENTED

This case presents the question whether anticompetitive activities by a Redevelopment Agency are protected by the state action exemption to the federal antitrust laws, when those activities are *expressly prohibited* by the State, which affirmatively does not authorize the displacement of competition and seeks action by unfettered private enterprise, and except for general authorizing legislation, the State does not supervise the anticompetitive conduct?

The associated question presented is whether a private developer violates antitrust laws by entering into a secret conspiracy with Redevelopment officials to restrain trade when those anticompetitive activities are *expressly prohibited* by the State?

LIST OF PARTIES

Petitioners are:

David A. Boone; Steven P. Fox; DSB-3 Group, a California Limited Partnership; Market/Post Ltd., a California Limited Partnership; Dave Goglio; Arnold Goglio; Three G's, a California Limited Partnership.

Respondents are:

Redevelopment Agency of the City of San Jose, a Body Corporate and Politic of the State of California; City of San Jose, a Municipal Corporation and Subdivision of the State of California; Frank Taylor, Executive Director of the Redevelopment Agency of the City of San Jose*; The Koll Company, a California Corporation.

---

* Frank Taylor was omitted from the published caption in the Ninth Circuit opinion, although he had been consistently previously named as a crucial defendant upon whom plaintiffs relied.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

CASES

Statutes

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et al.,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion and judgment of the Court of Appeals is officially reported at 841 F.2d 886 (9th Cir. 1988), and appears in Appendix A to this petition. A-1-22.[1] The Memorandum Decision rendered by the United States District Court for the Northern District of California and San Jose appears in Appendix B at A-23-32. The Second Amended Complaint that was dismissed appears in Appendix C at A-33-65.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was entered on March 1, 1988. This Petition For

[1] References to the Appendix are given in the following form: page 1 of the Appendix is referred to as "A-1", etc.

Writ Of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

This case involves the applicability of the Sherman Act, specifically 15 USC §§ 1 and 2, to the anticompetitive activities of the City's Redevelopment Agency acting in concert with a private developer to restrain trade, said activities being expressly prohibited by the State Legislature. Civil Rights Act 42 U.S.C. § 1983. The provisions of State law involved are: The California Community Redevelopment Act, Health and Safety Code, Sections 33032, 33037(a)(b), 33131(a), 33220(d), 33341, 33342, 33352, 33450, 33500; and California Constitution Article XIV, Section 6.

The pertinent provisions of the Sherman Act are set forth in Appendix L, A-186-188. The pertinent state statutes and constitutional provisions are set forth in Appendix L, A-188-199.

STATEMENT OF THE CASE

The Community Redevelopment Law of the State of California provides in Sections 33037 and 33342 (A-190, 192) for an essentially limitless and unsupervised authority for redevelopment agencies to do *anything* to redevelop blighted areas. However, this broad authority is repeatedly limited by the specific requirement that the Agency may act only when redevelopment cannot be accomplished by private enterprise acting alone [Health and Safety Code, Sections 33032, 33037(b) and 33352 (A-188, 189, 192)].

In this case the unanswered allegations of the complaint established that private enterprise acting alone had accomplished the redevelopment. In addition, the Redevelopment Agency (herein after "Agency") when it adopted the Amended Plan which ultimately was used to damage plaintiffs and support denial of plaintiffs antitrust claims, failed to have the mandated finding of blight required by the California authorizing statute (A-144-6, A-188).

Petitioners along with 4 other developers built office buildings in the Pueblo Uno Project Area of downtown San Jose pursuant to a Redevelopment Plan which expressly prohibited condemnation because private enterprise was expected to achieve the goals of redevelopment. (A-100) In fact, petitioners and other developers achieved the goals of the plan to alleviate and reverse blight.[2]

A critical provision and inducement to developers was for the Agency to provide adequate land and facilities for parking essential to the operation of the developers' businesses. Parking revenues would be generated by the developers using the Agency's facilities and the revenues would be used to provide additional parking as the phased development proceeded. (A-98, 99) The California Supreme Court in *City of Los Angeles v. Wolfe,* 6 C.3d 326, 336; 99 C.R. 21 (1971) has taken "*judicial notice of the fact of life that availability of parking facilities is essential to commercial enterprises in highly developed areas.*" (Emphasis added.)

In 1981 the petitioners were induced by the respondent Redevelopment Agency's Executive Director Frank Taylor, Downtown Coordinator Harry Mavrogenes, and Parking Coordinator Dennis Korbiak, to construct a $56 million office building in the project area without adequate parking. (A-45, 49) Thereafter beginning with a secret agreement in 1982 and continuing thereafter at least through 1984 the Agency and certain of its officials[3] conspired

---

[2] A-42; A-72-86, May 1985 photographs of successful private development of the project before the anticompetitive activities. A-70-71, photographs of Koll project with monopoly of all parking.

[3] The Ninth Circuit Opinion stated on A-13 and 14 that the complaint failed to disclose the authority of the persons making the promises and participating in the conspiracy. The complaint named Frank Taylor, Executive Director of the Redevelopment Agency, although Ninth Circiut opinion on the title sheet did not name him as a defendant-appellee; the clerk's record on appeal, CR Docket No. 130, contained a copy of the State Court action naming in addition Harry Mavrogenes, Downtown Coordinator, and Dennis Korbiak, Parking Coordinator. (A-88-89) Thus the specific names of at least three of the top Agency officials were before that Court. Under the holding in *Conely v. Gibson,* 355 U.S. 42, 45-46, 78 S.Ct. 99 (1957) the Ninth Circuit knew of facts

with defendant The Koll Company ("Koll") to, through the anticompetitive activity of *condemnation and a monopoly* on local parking, (*Corey v. Look,* 641 F.2d 32, 37 (1st Cir. 1981)), gain a monopoly on all of the office space in the redevelopment area. (A-36-57) Pursuant to this conspiracy the named Agency officials repeated duped petitioners with false promises so that petitioners would continue construction activities on a building which would be economically unviable without parking and so that petitioners would do nothing to hinder the monopolizing plans of Koll. (A-51-56) In order to deceive petitioners not to oppose the amended plan, a provision in the amended plan provided that all developers would be given "adequate land for parking," although this was opposite to the true intent of the conspirators. (A-101) As a further deception, in order to prevent petitioners and other developers from protesting the adoption of the plan within the 60 days provided for in Health and Safety Code, Section 33500 (A-199), repeated false assurances were given by Taylor, Mavrogenes and Korbiak to petitioners that their parking needs would be provided in the peripheral garage. (A-51-56)

After the 60-day period had expired for petitioners or any other developer to protest the adoption of the Koll plan, Koll Company officials who had given illegal campaign contributions to City officials, went to the Agency officials, Taylor, Mavrogenes and Korbiak, (A-163-185) and demanded that petitioners and all other developers be prevented from using the parking facilities in the peripheral garage in order to destroy their businesses and predatorially acquire them. (A-55, 56) These Agency officials then refused to provide the essential parking in violation of the parking management ordinance passed on March 29, 1984 (A-52, 53, 102). As a result of this anticompetitive conspiracy, Koll has acquired two of the developers' buildings at distress prices and forced a third developer into bankruptcy and foreclosure and will acquire that building, and has also forced petitioner into a Chapter 11 proceeding and, therefore, Koll with its control of

---

in the record which would perfect petitioners' claims by amendment which they denied. A-22

parking facilities, will ultimately own the entire project. (A-130-158)

On December 12, 1984, petitioners filed their complaint (A-33 *et seq.*) in the United States District Court for the Northern District of California, sitting in San Jose, charging respondents with anticompetitive practices in violation of the Sherman Act and requesting damages and injunctive relief. (A-33 *et seq.*) Respondents raised the defense of State Action Immunity and Noerr- Pennington Immunity. Respondent Agency filed counterclaims against petitioners charging the antitrust offenses based upon the filing of this lawsuit which counterclaims are still pending.

Although the respondents were allowed full discovery, the District Court barred petitioners from any discovery (A-159, 160). After taking extensive discovery defendants moved for dismissal pursuant to Rule 12(b)(6). The District Court granted that motion, without leave to amend, relying in part on its clearly erroneous finding that petitioners had stipulated to the order staying discovery when in fact petitioners opposed the staying of discovery and the order so recites that the nature of the hearing was contested. (A-27, 159-160)

After a Rule 54(b) certification the matter was timely appealed to the Ninth Circuit Court of Appeals which found jurisdiction pursuant to 28 U.S.C. Section 1291. (A-1)

The Ninth Circuit affirmed the dismissal without leave to amend, in part relying on the erroneous finding that petitioners had failed to identify persons who had made false promises to them (A-15,16) and without comment on the bar to discovery imposed upon petitioners. (A-1-22)

Of crucial importance to the Ninth Circuit decision dismissing petitioners claims against the Agency was its significant extension of its own *Llewellyn* rule, (*Llewellyn v. Crothers,* 765 F.2d 769 (9th Cir. 1985)), which held that minor errors by *state* officials did not vitiate state antitrust immunity. In this case when displacement of competition is not authorized the Ninth Circuit found that the "same concerns" provided immunity to Agency officials who directly violated state authorizing law prohibiting

displacement of competition and who, by such violation lost all authority pursuant to that law. (A-10)

In rejecting the possibility of petitoners *ever* pleading an antitrust case against Koll the Ninth Circuit found that *Noerr-Pennington* immunity extended to a secret conspiracy to violate state law, to use a co-conspirator public official to make administrative and legislative actions a sham and prevented petitioners from judicial corrective remedies against the illegal plan by deceiving them until after the 60-day limitation period for attaching the plan had expired (A-51-56) (Health and Safety Code, Section 33500, A-199). It erroneously extended Noerr-Pennington doctrine by finding that even such secret backroom dealings which block rather than foster open communication with the government are to be granted immunity. The Ninth Circuit decision is completely erroneous.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT OPINION UNDERCUTS CLEARLY ESTABISHED LAW LIMITING THE STATE ACTION ANTITRUST IMMUNITY TO ACTIONS AUTHORIZED BY A STATE AND EXTENDS SUCH IMMUNITY TO ACTIONS *EXPRESSLY PROHIBITED* BY THE STATE

While *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) extended a broad "state action" immunity to federal antitrust laws, such immunity was severely limited in such cases as *Cantor v. Detroit Edison,* 428 U.S. 579 (1976); *City of Lafayette, La. v. La. Power & Light Co.,* 435 U.S. 389, 98 S.Ct. 1123 (1978); and *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40, 102 S.Ct. 835, 20 L.Ed.2d 810 (1982). Those cases developed the rule that actions by municipalities or other entities distinct from the states themselves were entitled to antitrust immunity *only* if the anticompetitive act was pursuant to a clearly articulated and affirmatively expressed state policy actively supervised by the state. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 25 (1985) made clear that active state supervision is not a prerequisite to munici-

pality immunity and that the clear articulation requirement is met when anticompetitive effects logically result from the grant of authority.

The Ninth Circuit in *Llewellyn v. Crothers,* 765 F.2d 769 (1985) extended these rules by its holding that an authorizing law violation by a *state* official in carrying out a *state* legislative mandate did not vitiate the antitrust immunity since the action remained that of the state and a policy of regulation had been expressed in the authorizing statute. In this case no state official was involved. This case involves a redevelopment agency whose existence and power are simply those provided by the state law. Yet the Ninth Circuit in this case found that state action immunity remained even after violation of that law, which law expressly limited agency actions to areas where private enterprise failed and which expressly preferred freely competitive private enterprise to governmental action and regulation.

The Supreme Court has previously held that a municipality is immune from antitrust liability under the state action exemption if it can demonstrate that "it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 40 (1985); see *Parker v. Brown,* 317 U.S. 341 (1943). It is not necessary that the legislature explicitly state that it intends municipalities to engage in anticompetitive conduct pursuant to the state policy; it is enough that "anticompetitive effects logically would result from [the] broad authority to regulate." *Hallie, supra,* at 42. From these principles, it is clear that an antitrust violation would be established by showing that a municipality restrained trade by acting contrary to the clearly articulated state policy.

A court essentially may adopt one of the two approaches when it is attempting to determine whether anticompetitive conduct was contemplated by a state legislature. First, the court can examine the particular anticompetitive conduct against the background of all of the state's laws, and disallow any conduct that might conflict with another state policy as expressed in other statutes. In other words, the court would assume that any anticompetitive conduct that conflicts with other state policies was not foreseen by the legislature. On the other hand, a court can

presume that a legislature intended to authorize all anticompetitive conduct that foreseeably could flow from the enabling statute and *leave it to the legislature to expressly limit the anticompetitive conduct, if necessary, to avoid potential conflicts with other state policies.* This is an extentsion of the approach taken in *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987). This is the approach used by the Supreme Court in *Hallie, supra.* The Court refused to impose a requirement that a state explicitly authorize anticompetitive conduct in order to immunize a municipality's subsequent actions, explaining that "no legislature can be expected to catalog all of the anticipated effects of a statute of this kind." It noted further that:

> "Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny." *Hallie, supra,* 105 S.Ct. 1719, n.7.

Under such extension of *Hallie, in the absence of a limitation of powers in the enabling statute,* a court may presume that the legislature intended to authorize all of the foreseeable anticompetitive conduct of its authorization, including that conduct that potentially conflicts with other state policies.

In the instant action *displacement of competition was not authorized*, the legislature having *expressly limited and prohibited* the anticompetitive activities of the Agency such as *condemnation and monopoly* when private enterprise without public assistance had accomplished or could accomplish the goals. (Health and Safety Code, §§ 33032, 33037(b), 33352 at A-188, 189, 192) Thus, under the most conservative view it is clear that an antitrust violation is established here.

This distinction alone establishes the essential difference between the case at bar and the 3 redevelopment cases cited by the Ninth Circuit. (A-9) *Cine 42nd Street Theatre Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032 (2d Cir. 1986); *Scott v.*

City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied,* 471 U.S. 1003 (1985); *Reasor v. City of Norfolk,* 606 F.Supp. 788 (E.D. Va. 1984).

In *Cine 42nd, supra,* the action was against the *State* and City Urban Development Organizations. The court on page 1036 found that private enterprise acting alone could *not* accomplish the legislative purpose of the State Agency. The *only* limitation on the state agency was that it must find the area to be *blighted.* The court found the area was blighted. There was no New York requirement corresponding to the here unmet California requirement of a finding that private enterprise could not by itself accomplish the result.

Another essential difference was that the redevelopment organization gave an *exclusive* developer agreement to Nederlander, also bid for by the plaintiffs. Thus, there was no destruction of existing competition. No other developer had built in the redevelopment area nor was there any one willing to pioneer the area without government assistance. There were no charges of illegal activity. There was no conspiracy to drive out of business existing developers so that the latecomer could illegally get everything.

In *Reasor, supra,* a summary judgment disposition after discovery, the city gave an *exclusive* development contract to the defendant developer prohibiting for a time any other development in the area. The city had *lawfully* invested monies to remove blight by acquiring properties under condemnation proceedings. The legislature had made no provision as in California to encourage private enterprise. Plaintiff could not prove by discovery or declaration *any illegal conduct* 606 F.Supp. at 797.

The last case in the trilogy, *Scott v. City of Sioux City,*736 F.2d 1207 (8th Cir. 1984), also a summary judgment case, also presents a factual situation opposite to the case at bar. Iowa like New York and Virginia has no similar statutes as California Health and Safety Code, Sections 33037, 33032, and 33352, mandating that only when private enterprise acting alone fails in redevelopment do municipalities have power to act.

Sioux City condemned and acquired properties with legal Redevelopment Bond issues and gave an *exclusive* development

agreement to defendant developer. No other developer had built in the area. In order to protect its investment in the downtown area it changed the land use zoning on the periphery of the city to prevent competing commercial development. *Even after complete discovery there was no evidence of illegality or conspiracy.* While the city did not amend the master plan before changing the zoning ordinance on the outskirts, the court found these were "ordinary errors" which could be corrected at any time (736 F.2d at 1216.).

Here there were *two* legislatively required conditions for agency actions: actual urban blight which cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone (Health and Safety Code § 33037) *and* a finding that improvements cannot be accomplished by private enterprise acting alone. As pointed out in *Emmington v. Solano County Redevelopment Agency* 195 Cal.App.3d 491, 497, 237 Cal.Rptr. 636 (June 1987) "the blighted condition of the area is the very basis of the redevelopment agency's jurisdiction to acquire the property by eminent domain and expend public funds for its redevelopment." *Regus v. City of Baldwin Park,* 70 Cal.App.3d 968, 980, 139 Cal.Rptr. 196 (1977) sets forth the California definition of blight:

> ". . . blight in the context of this case can only be found in the *inability of private enterprise to redevelop the area."* (Emphasis added.)

Plaintiffs here established, both by allegations in the complaint and by other material properly before the District Court and Ninth Circuit that *by 1981,* well before the conspiracy and well before the amended Redevelopment Plan pursuant to which the Agency carried out its anticompetitive acts, private enterprise acting alone had eliminated blight. (A-42, A-72-86)

Thus blight, the very basis of the Agency's jurisdiction, had been eliminated prior to the amended plan's adoption or anticompetitive acts. Private enterprise acting alone had not only shown that it might reasonably be expected to alleviate blight, it had alleviated it. No finding of blight or the inability of private enterprise to carry out improvements was or could be made.

Thus essential elements in the grant of state power to respondent Agency were demonstrably absent. In fact the Agency acted *contrary* to the clear state policy in favor of private enterprise acting alone. Accordingly it should have been held to have lost state authority and hence state action immunity. The Ninth Circuit instead held immune from antitrust attack Agency action which was without state granted jurisdiction, in contravention of express limits in the state policy, and in opposition to the clearly articulated and affirmatively expressed policy prohibiting displacement of competition favoring private enterprise acting alone.

In the instant action the displacement of competition by *condemnation and monopoly* is not authorized by the state, and is expressly prohibited, therefore the Agency is not immune from the Sherman Act. The state procedure to challenge the conduct (Health and Safety Code Section 33500, A-199) cannot remedy the antitrust wrong because the conspiracy included a deception to prevent petitioners from judicially challenging the adoption of the amended plans within the 60 day statutory limitation for such challenge (A-51- 55). *Emmington v. Solano County Redevelopment Agency,* 195 Cal.App.3rd 491, 497-499; 237 Cal.Rptr. 636 (June 1987); *Regus v. City of Baldwin Park,* 70 Cal.App.3rd 968, 979-981 (1977). Thus it is too late, *condemnation, monopolistic activity* and the destruction of 5 developers in the project has already occurred. Koll has already profited by acquiring 2 of the properties with the likelihood that the remaining properties including petitioners will fall in the hands of Koll.

II

THE NINTH CIRCUIT DECISION WILL PERMIT REDEVELOPMENT AGENCIES TO OPERATE WITH COMPLETELY UNFETTERED POWER TO EITHER DESTROY PRIVATE ENTERPRISE OR TO CREATE AND SUPPORT MONOPOLISTIC PRIVATE ENTERPRISE

California, as have other states, has recognized that the problem of urban blight may not have simple solutions. Accordingly, it, like other states, has granted broad powers to redevelopment

agencies so that a variety of governmentally supported approaches may be used to attempt to rectify urban blight. Without being subject to the usual legal and practical limits to the exercise of governmental power, redevelopment agencies participate in numerous and roles usually reserved for the private sector. In fact they may, at their own discretion, either completely replace the private sector or team up with certain elements of it, good or bad, to accomplish perceived goals of the agency.

Recognizing the substantial potential for abuse inherent in such power, California, as have other states, has placed some limits on the power of those other bureaucratic agencies. In this case the crucial limits were the finding and the reality that the bureaucratic governmental exercise of power was necessary, that private enterprise *could not* and *had not* alleviated blight. The Ninth Circuit held that the violations of those limits was immaterial, that once there had been a state grant of power to these local governmental agencies they had the unfettered right to create monopolies and to destroy competition.

By so holding, the Ninth Circuit undermined rather than furthered state interests. Instead of recognizing the right of states to grant power subject to limitations, it held that abuse of the limitations was in furtherance of state interests and thus immune from antitrust attack. While California's limitations related to the support of private enterprise and constituted a prohibition against governmental action unless the failure of private enterprise was established, the Ninth Circuit reasoning is not so limited and applies to any legislatively contained limitations on redevelopment agency power. Pursuant to that reasoning, redevelopment agencies may monopolize business and hand out private concessions without regard to limiting language in authorizing statutes.

By the subterfuge of characterizing the prohibited anticompetitive acts as "ordinary errors" the Ninth Circuit turns an antitrust injury into merely a immunized procedural deficiency, and thus allows the monopolistic predator to profit from the wrongs which cannot be remedied in any other action other than this antitrust suit.

There is no public purpose served in so enhancing the power of local bureaucracies which may be power hungry or corrupt. Whether or not there is real wisdom in permitting these agencies to undertake economic projects normally in the hands of private enterprise, there is real danger in removing legislatively imposed conditions and restrictions from them. By so enhancing their power to violate antitrust laws the Ninth Circuit opinion has unduly enhanced the role of redevelopment agencies in our country, a role which California, at least, specifically subordinated to private enterprise. This Court should act to restore to the states their power to limit the activities of redevelopment agencies.

III

THE NINTH CIRCUIT UNDULY EXTENDED THE NO-ERR-PENNINGTON RULE TO GRANT IMMUNITY FOR A BUSINESS CONSPIRACY TO MONOPOLIZE BECAUSE ONE PARTICIPANT WAS A MUNICIPAL AGENCY AND IS IN CONFLICT WITH OTHER CIRCUITS

In *Eastern Rail Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 2d 464 (1961) a publicity campaign designed to influence state laws relating to trucks was held immune from antitrust attack. Justice Black's opinion, at 365 U.S. 136, found that an association to persuade an executive or legislation bore little if any resemblance to combinations, such as an agreement to take away the trade freedom of others, normally held violative of the Sherman Act.

A few years later, in *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) joint activities between certain coal companies and the United Mine Workers (UMW) were held immune from antitrust attack even though the activities may have been pursuant to an unlawful conspiracy between the coal companies and the UMW to eliminate the competition of certain other coal companies.

Both cases stressed the goal, essential to a democracy, of free and open communication with governmental officials. Neither case involved a governmental official, participating in a quasi-

business entity, entering into a secret conspiracy to violate State law and destroy competition. Neither case involved a program of secret agreements, duplicity, and falsehoods barring access to judicial tribunals and designed to eliminate normal open governmental communication.

Until the instant decision the Ninth Circuit maintained a distinction, in applying this governmental communication immunity, between cases like this in which the governmental official was an active conspirator and participant in the monopolistic scheme and those like *Noerr* and *Pennington* in which any conspiracy excluded the governmental officials who were to be influenced. Thus in *Harman v. Valley National Bank of Arizona*, 339 F.2d 564, 566 (9th Cir. 1964) that court held that the state official was a *"participating conspirator"* and therefore merited no protection. In *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) Justice Browning held at p. 344.

> However, *Harman* also holds that the Sherman Act may reach the acts of a government official if he is himself a participating conspirator in a scheme which violates that Act (citation omitted). Pennington does not hold to the contrary. As the Supreme Court noted, the public official involved in Pennington was 'not claimed to be a co-conspirator.' "

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1567 (5th Cir. 1984) and *Mason City Assoc. v. City of Mason City*, 468 F.Supp. 737 (N.D. Iowa 1979) are to the same effect. In the decision below the Ninth Circuit abandoned its previous alignment with the Fifth Circuit and joined with the Seventh Circuit opinion, *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) in holding that even active participation in a monopolistic conspiracy by a governmental official immunizes that conspiracy from antitrust attack.

In this case the Ninth Circuit also parted from the Eighth Circuit holdings in *Central Telecommunications, Inc. v. TCI Cablevision Inc.*, 800 F.2d 711 (8th Cir. 1986) and *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978) that hold that *Noerr-Pennington* governmental communication

immunity is limited to genuine lobbying activities and does not extend to actions taken in connection with government officials to directly injure a competitor *by that official's violation of State law prohibiting displacement of competition.*

In this case Koll conspired with certain Agency officials to have the Agency condemn land, (A-32), eliminate parking, (A-32), make false representations in order to bar normal judicial review (A-51-56) and otherwise to act with Koll to destroy competition and create a monopoly. All of the challenged communications were secret conspiratorial conferences designed to take away the trade freedom of petitioners and others, the very activity distinguished by Black, J. in *Noerr.*

While the Ninth Circuit criticized at p. A-17-18 of its opinion, the lack of specificity in petitioners allegation, such criticism is hardly support for a *dismissal without leave to amend* in the face of a *complete discovery bar.*[4]

The Ninth Circuit has rendered legal essentially *all* activity involving governmental officials which is designed to destroy competition. This Court's decisions in *Noerr* and *Pennington* were never intended to permit such a result. With ever increasing local government intrusion into private enterprise such immunity will not serve the nation and will instead encourage corruption, cronyism and uneconomic practices.

In the instant action the conspiracy included blocking petitioners from access to state judicial tribunals by deceiving them, until after the 60-day period had expired to challenge the plan, with promises that they would be given the essential parking in the peripheral garage (Health and Safety Code Sec. 33500, A-199, A-51-56). *Emmington v. Solano County Redevelopment Agency, supra,* 497-499. The Ninth Circuit erroneously concluded that corrective processes were available and that petitioners could have

---

[4] In fact the record contains the specific amounts of illegal campaign contributions and profits made by City officials from illegal City bond issues used to finance Koll. (A-163-185) The Ninth Circuit knew facts which would have perfected petitioners' claims. *Id.* at *Conely v. Gibson,* supra.

resorted to them (A-10). Because of the conspiratorial-deception it was and is too late, the damage was done and Koll has illegaly profited. Certainly this conduct should not be protected by *Noerr-Pennington* immunity.

CONCLUSION

For all the reasons stated herein, the Ninth Circuit decision is completely erroneous and your Petitioners respectfully pray that this Petition for a Writ of Certiorari be granted.

Dated: May 31, 1988.

Respectfully submitted,

HERBERT F. KAISER
Attorney for Petitioners